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728-189—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 19, 1963.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 17–28) is reported at 325 F. 2d 101. The opinion and order of the Federal Trade Commission (R. 628–662)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, pp. 29–30) was entered on November 19, 1963.

[1] "R." refers to the Appendix to Brief for the American Oil Company in the court of appeals.

The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark on February 17, 1964, and March 18, 1964, to and including March 18, 1964, and April 17, 1964, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(a) of the Clayton Act prohibits a seller from discriminating in price between its customers "where the effect of such discrimination may be substantially to lessen competition * * *, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *." The question presented is whether the requisite competitive injury is established by showing that a seller has discriminated in price among purchasers for resale who compete with each other, that the amount of such discrimination is substantial, that the discrimination is directly reflected in the resale prices of the purchasers, and that its actual or probable effect will be the shift of retail customers from the unfavored to the favored purchasers.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in part as follows:

> That it shall be unlawful for any person engaged in commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers

involved in such discrimination are in commerce * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

This case involves the standards for determining whether price discriminations given by a major oil company to retail gasoline service station operators during a gasoline price war had a sufficiently adverse effect upon competition to bring them within the prohibitions of Section 2(a) of the Clayton Act. The price war occurred in Smyrna, Georgia, for a 17-day period in October, 1958, during which the respondent The American Oil Company ("American") granted substantially lower prices to its retail dealers in Smyrna than it gave to its dealer in the adjoining city of Marietta, Georgia.

The facts. The underlying facts are not in dispute, and the following statement is based mainly upon the court of appeals' opinion. American is a major distributor of gasoline, which it sells to independent service station operators under its brand names of "Amoco" and "American" (App. A, *infra*, p. 19). Smyrna and Marietta are adjoining cities located approximately fifteen miles northwest of Atlanta (*id.*, p. 19). American has four dealers in the Smyrna area and six dealers in the Marietta area (*id.*, p. 20). For purposes of gasoline pricing, American treated each area separately (*id.*, p. 20).

The price war began when an operator of a major brand station (Shell) in Smyrna posted a pump price meeting exactly the pump price of a station (Paraland) selling an "unbranded or private brand gasoline" (*id.*, p. 21). Other stations in the vicinity selling other "major brands" (Texaco, Sinclair and Gulf), as well as an American dealer (Hicks), lowered their pump prices to match those of the Shell station. In each instance, the supplier gave its Smyrna dealers a discount sufficient to enable them to meet the lower posted price and yet maintain the normal gross margin of five cents per gallon between their buying and selling prices (*id.*, pp. 20–22). As the price war continued, American and the other suppliers of major brand gasoline continued to sell to their Smyrna area dealers at lower prices than they were selling to their Marietta area dealers. Whenever American reduced its price to its Smyrna dealers, it matched a prior reduction which at least one of the other major brands had granted to its dealers in Smyrna (*id.*, pp. 21-22). The differential which American gave its Smyrna dealers over its Marietta dealers ranged from 3.5 cents to 11.5 cents per gallon (*id.*, p. 21).

People residing in the Marietta area "regularly drove into or near Smyrna to work or to shop" (R. 633), and thus had "ready access to all of the favored Smyrna stations" (R. 607). The gasoline price war in the Smyrna area attracted customers from the Marietta area (App. A, *infra*, p. 24). Some motorists had a preference for American's gasoline "if the

price differential was not too great" (*id.*, p. 24; R. 192–194, 633). At least three American dealers in Marietta lost business to American dealers in Smyrna who had received the lower prices (Smith, R. 119–120; Seagraves, R. 132; Hitt, R. 281–283).

The Commission proceedings. On November 23, 1960, the Commission issued a complaint charging that American had violated Section 2(a) through the foregoing price discriminations (R. 3–6). After full hearings, an examiner issued an initial decision (R. 598–622) concluding that American had committed the violation charged.

On appeal, the Commission (Commissioner Elman dissenting) modified and adopted the initial decision (R. 633–644), and entered a cease-and-desist order (R. 628–629). The Commission found (R. 633–634) that American's Smyrna and Marietta dealers competed with each other in the resale of American's gasolines; that the instances of American's discrimination were substantial in amount; that the discrimination was directly reflected in the dealers' resale prices of American's gasolines; and that such differences in resale price were sufficient to and did divert customers from American's Marietta to its Smyrna dealers. The Commission concluded (R. 635) that these instances of price discriminations seriously impaired the competitive opportunities of the Marietta dealers and, accordingly, that their effect may have been substantially to lessen competition or to injure, destroy or prevent competition with the Smyrna dealers.

The Commission rejected (R. 635–636) American's contention that the short duration of the price discriminations barred a finding of competitive injury. The Commission also rejected (R. 635) American's argument that its Marietta dealers "would have been injured" by the lower prices of dealers selling other brands of gasoline irrespective of whether American reduced its price to Smyrna dealers. The Commission pointed out (*ibid.*) that American had in fact discriminated in price and that such discrimination adversely affected competition between American's dealers in the resale of American's gasolines.[2]

The Court of Appeals decision. The court of appeals set aside the Commission's order on the ground that the requisite injury to competition had not been shown. It held (App. A, *infra,* pp. 23–24) that the adverse effect upon competition which the statute prohibits is "such an injury as will with reasonable probability substantially lessen the ability of the unfavored dealers to continue to compete"; that although the statute "is concerned" with "[p]rice discrimination which shifts business between competitors in a 'second line' case * * * it is essential to the establishment of the violation here charged that

[2] The Commission also rejected American's contentions that its lower prices in Smyrna were justified (1) under Section 2(b) as made in good faith to meet an equally low price of a competitor (R. 637–641), and (2) under the proviso to Section 2(a) permitting "price changes * * * in response to changing conditions affecting the market for or the marketability of the goods concerned" (R. 642). Since the court of appeals set the order aside on the ground that the requisite injury to competition had not been shown, it did not reach these other issues (App. A, *infra*, p. 28).

there be a causal relation between the price discrimination to the favored customers and the factor relied upon as evidencing an actual or reasonably probable substantial lessening of ability to compete on the part of the unfavored customers;" and that in this case "not only was the actual economic loss sustained by the unfavored Marietta dealers during the Smyrna price war slight, but there is a lack of any substantial evidence to support a conclusion that this temporary and transient limited economic impact was the result of American's discriminatory price reduction to its Smyrna dealers, much less that it constituted a probable threat to the ability of the Marietta dealers to continue in competition." The court concluded (*id.*, pp. 26–27) that any actual or probable injury to the Marietta dealers' ability to compete shown by the record "was not only minimal but there is no substantial evidence to show that it was the result of American's price reductions to its Smyrna dealers rather than for the most part attributable to the fact that the major brands of gasoline were being sold in the Smyrna area for substantially less than in the Marietta area."

REASONS FOR GRANTING THE WRIT

This case presents a major question under the price discrimination prohibitions of Section 2(a) of the Clayton Act which this Court should resolve because of its importance both to the Federal Trade Commission in its attempts to deal with the competitive problems posed by retail gasoline price wars and to thousands of retail service station operators.

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Gasoline price wars are a widespread phenomenon in the oil industry. The major oil companies customarily subsidize the dealers who conduct such battles by giving them substantial price concessions not given to competing dealers in neighboring areas who are not participating in the price war. These widespread price discriminations have created a serious economic problem for the thousands of independent retail gasoline dealers who are the victims of discriminatory treatment. Congress has frequently studied the problem and has expressed its concern over the plight of these small businessmen. The Commission has pending a substantial number of proceedings involving gasoline price wars, many of which rest on the same theory of injury to competition as the present case. A court of appeals decision with such far-reaching impact should be reviewed by this Court.

1. Gasoline price warfare at the retail level is widespread and, as this Court noted last Term, "appears to be caused by a number of basic factors, not the least of which are industry overcapacity and the propensity of some major refiners to engage in so-called 'dual marketing' under which, in order to increase their overall sales and utilize idle facilities, they not only sell branded gasoline to their own dealers but also sell unbranded gasoline to independent retailers or jobbers, often at a lower price" (*Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 525). Numerous service station operators believe that "many price wars were started and controlled by the major oil companies for the purpose of either moving surplus gasoline or disciplining retail price

cutters" (H. Rep. No. 1423, 84th Cong., 1st Sess., p. 12). But whatever the causes of the various types of price wars (*id.*, 13–17), they have a serious impact on the dealers in the area.

Because of the limited resources and the narrow margin upon which retail gasoline dealers operate—generally 4 to 5 cents a gallon—it is necessary for their suppliers to subsidize them in any substantial price war. The subsidization customarily takes the form of an allowance off the regular wholesale price that covers all, or the major part, of the retail price reductions. This aid is ordinarily available, however, only to dealers directly participating in the price war. Because of the close physical proximity of many other service stations selling the same brand of gasoline, the resulting discrimination may—and frequently does—have a seriously adverse economic impact upon the dealers who do not receive the lower prices from suppliers but are close enough to the price war area to suffer a diversion of business. See S. Rep. 2810, 84th Cong., 2d Sess., pp. 19–20; see, also, *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 510.

Various congressional committees and individual members of Congress repeatedly have expressed concern over the serious anticompetitive effects of these price wars (see, *e.g.*, 110 Cong. Rec. 4975). The Senate Select Committee on Small Business, which investigated a protracted gasoline price war in New Jersey, reported that it "had reduced the dealers to a desperate financial plight, from which they were unable to extricate themselves," and urged the Commission to "move promptly against any major sup-

plier still granting discriminatory price allowances to some of his dealers" (S. Rep. 2810, 84th Cong., 2d Sess., pp. 14, 29).

The investigation and hearing of cases involving price discriminations growing out of retail gasoline price wars currently is a major part of the Commission's enforcement activities under Section 2(a) of the Clayton Act. Two cases have been argued before the Commission and are awaiting decision (*Texaco, Inc.*, Docket 6888, and *Shell Oil Co.*, Docket 8537); a third case is pending before the hearing examiner (*Humble Oil & Refining Co.*, Docket No. 8544). Eight other price discrimination matters are in various stages of investigation, although no complaints have been issued. The three formal cases and the eight investigations are all based on the same theory of injury to competition that is involved in the present case.

The three respondents in those cases, and seven of the eight companies involved in the investigations, all do business in the Seventh Circuit. Review of any orders the Commission may enter in those cases is almost certain to be sought in the Seventh Circuit, and that court, following its decision in the present case, would undoubtedly set aside any orders. Hence there is little chance that a conflict between two circuits can be developed. The decision below, if allowed to stand, will become the definitive judicial ruling.

In these circumstances, and because of the obvious public importance of the question, review by this Court is warranted.

2. The Commission submits that *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, fully supports its conclusion that the effect of American's price discriminations in the present case may have been "substantially to lessen competition" or to "injure, destroy or prevent competition" between American's Marietta and Smyrna dealers. The question in that case was whether the Commission had properly concluded that a quality discount system, under which large retailers who purchased directly from Morton Salt paid lower prices for salt than competing independently-operated retail stores who purchased salt from jobbers, had the adverse effect on competition that the statute condemns. The record before the Commission contained "testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices" (334 U.S. at 50). The Court admonished the Commission for going "much further in receiving evidence than the statute requires," since there was no need for "testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence" (pp. 50–51). The Court emphasized the same point when, in noting that the Commission had not been re-

quired to find, as it did, that "injury to competition * * * had resulted from respondent's discounts," it stated (pp. 46–47):

> Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay.

In the present case, the Commission believes that the substantial discounts which American gave to its Smyrna dealers similarly justified the conclusion that the requisite injury to competition had been shown because "the competitive opportunities of those dealers who were required to pay the higher prices were seriously impaired" (R. 634). The differentials ranged from 3.5 to 11.5 cents per gallon, and they were directly reflected in the retail pump price of the gasoline. The Commission noted that American's district sales manager "admitted that a price difference of 5 to 6 cents a gallon at retail would be sufficient to affect competition between dealers located in Smyrna and those located in Marietta" (R. 633–634; R. 275). The record shows that, as a result of the lower prices which the discriminations enabled American's Smyrna dealers to charge, American's Marietta dealers lost business to their competitors in that city (see, *supra*, p. 5). As this Court explained in the *Sun Oil* case, *supra*, 371 U.S. 505, 519 (making minor changes in the language to fit the facts of the present case):

> It is the very operators of the other [American] stations [in Marietta] which compete with

> [the American stations in Smyrna] who are the direct objects of protection under the Robinson-Patman Act. The basic purpose of the Act was to insure that such purchasers from a single supplier, [American], would not be injured by that supplier's discriminatory practices.

Thus, in the present case, as in *Morton Salt*, it would "appear to be obvious, that the competitive opportunities of certain merchants [the Marietta dealers] were injured when they had to pay respondent substantially more for their goods than their competitors [in Smyrna] had to pay" (334 U.S. at 46–47). And, as *Morton Salt* teaches (p. 50), that is enough to establish the " 'reasonable possibility' that competition may be adversely affected" which the statute requires. Indeed, in the Commission's view the injury to competition resulting from the price discriminations in the present case was even more severe than in *Morton Salt*. For the product there involved—salt—was only "a small item in most wholesale and retail businesses" (334 U.S. at 49), whereas gasoline is the principal product sold by service stations.

The Commission believes that the court of appeals' attempted distinction of *Morton Salt* on the ground that it involved a "discriminatory pricing system * * * which gave buyers of large quantities a built-in, routine and permanent price advantage over smaller rivals," whereas the present case involved temporary price reductions resulting in relatively small shifts of business (App. A, *infra*, pp. 27–28), is unsound. As the Commission reads *Morton Salt*, the significant fact there was not the systematic character of the

discriminations, but the obvious economic reality that a merchant who had to pay significantly more for his product than his competitors was under a serious economic handicap. The Marietta dealers in the present case, who had to pay from 3.5 to 11.5 cents more per gallon than their Smyrna competitors, obviously could not hope to compete effectively against those dealers. And this competitive handicap, with its consequent probable adverse effect upon competition, existed as long as the price war continued. Although the court of appeals' opinion purports to rest primarily on a rejection of the evidentiary support for the Commission's finding of competitive injury, this ruling in turn necessarily is based upon a fundamental disagreement with the Commission as to the kind of showing sufficient to establish such injury, and it is on that issue that the Commission believes *Morton Salt* to be controlling.

In short, the Commission believes that if *Morton Salt* means what it seems to say, it was fully warranted in concluding (R. 633) that "in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discimination was substantial." Indeed, under this view it was unnecessary for the Commission further to consider whether in fact there was any significant diversion of business from American's Marietta to its Smyrna dealers.

Perhaps the Commission's reading of *Morton Salt* is too broad but with the agency charged with administering the statute and the only court of appeals likely to pass upon the issue holding opposite views upon a question of such widespread impact, review upon certiorari is warranted. For only this Court can definitively settle whether its prior decision means what it appears to say, or whether, as the court of appeals held, its broad language is to be limited to the particular type of price discrimination there involved, namely, a quantity discount *system*. The Court's citation of Commissioner Elman's dissenting opinion in the present case in its *Sun Oil* opinion (371 U.S. at 527, n. 15) cannot be deemed a considered determination of the point.

CONCLUSION

In view of the importance of the question in the Commission's administration of the Clayton Act, the economic significance of the problem, and the unlikelihood of a conflict developing between the circuits, the Solicitor General joins the Commission in urging that certiorari be granted. The Solicitor General, however, does not agree with the Commission in its reading of *Morton Salt* or on the merits, and if the petition for certiorari is granted, he will not support the agency further.

Respectfully submitted.

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APRIL 1964

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term, 1963. September Session, 1963

No. 13879

THE AMERICAN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to review and set aside an order of the Federal Trade Commission

November 19, 1963

Before CASTLE, KILEY and SWYGERT, Circuit Judges

CASTLE, *Circuit Judge.* This case is before the Court on the petition of The American Oil Company (hereinafter referred to as American) for review[1] of a cease and desist order issued against it by the Federal Trade Commission, respondent, following a hearing on a complaint charging American with violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (15 U.S.C.A. § 13(a)).[2]

[1] Review is sought pursuant to 15 U.S.C.A. § 21.

[2] 15 U.S.C.A. § 13(a) provides in pertinent part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within

The Commission found[3] that American had engaged in discriminatory pricing practices in connection with the sale and distribution of gasolines to its dealer-customers in and around Smyrna and Marietta, Georgia, by selling such gasolines to certain of its customers at higher prices than it did to other customers, and that the discriminations in price had the effect on customer competition proscribed by the statute. The Commission rejected American's affirmative Section 2(b) defense[4] that any lower price to any dealer in the area was made in good faith to meet an equally low price of a competitor. Also rejected was American's claim that any differences in its prices were the result of price changes in response to changing conditions affecting the market for or the marketability of the goods concerned.[5]

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the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *"

[3] On American's appeal from the examiner the Commission filed an opinion in which it modified the initial decision of the examiner, then adopted it as its own, and issued the order brought here for review. Commissioner Elman dissented from the majority ruling.

[4] Section 2(b) of the statute (15 U.S.C.A. § 13(b)) provides in pertinent part: "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. * * *"

[5] This defense was asserted under the following proviso to Section 2(a): "And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or

The record discloses that American is engaged in the sale and distribution of gasoline and other products in twenty-five states and in the District of Columbia. In connection with its business in the State of Georgia, American has entered into contracts with service station operators pursuant to the provisions of which it sells and delivers its "Amoco" and "American" gasolines, according to the dealer-customers' requirements and orders. Ten of American's dealers are located in and around the vicinity of Smyrna and Marietta, Georgia. American's pricing practices in the sale of gasoline to these ten customers during a seventeen day period only is here involved. This period extended from October 10 to 28, 1958, and coincided with a gasoline price war in Smyrna.

Smyrna and Marietta are adjoining cities located approximately fifteen miles northwest of Atlanta, Georgia. Their common border consists of contiguous residential communities. Marietta is north of Smyrna. There are two main north-south highways in the Smyrna-Marietta area—State route 3 and U.S. route 41. State route 3 is the main highway from Marietta south to Smyrna which connects both cities with the Lockheed Aircraft Corporation plant and Dobbins Air Force Base. Also located on State route 3, in the heart of Smyrna, is a large shopping center patronized by inhabitants of the Smyrna-Marietta area. U.S. route 41 is a four lane highway running somewhat parallel to and about two miles east of route 3. It is a main arterial route between the mid-

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the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

western states and Florida. The aircraft plant and the airforce base are located between the two highways.

For the purpose of gasoline pricing the Smyrna-Marietta area was divided into two areas. Area #1 or Smyrna area included generally the City of Smyrna and the areas to the south. Four of American's customer-dealers were located in this area. Area #5 or Marietta area included the City of Marietta and certain of American's dealers located to the south of Marietta and to the east of Smyrna on U.S. 41. Six of American's dealers were located in this area. The pattern of traffic flow between the two cities, and to and from the industrial plant, airforce installation and the shopping center, was such that local motorists had ready access to most of the American dealers located in either of the pricing areas.

In establishing the prices its dealers are to pay for gasoline. American quotes a tank wagon price. In addition, as conditions may require, American establishes a competitive price allowance (CPA) which it grants to its dealers in the predetermined area. Accordingly, as the "CPA" increases the price paid by the dealer for the gasoline decreases. Dealer's pump prices to their patrons are based on the net price afforded them by American, their supplier. Generally the dealers maintain a gross margin of profit of five cents per gallon. Thus the amounts of all price differences either in the purchase price or the resale price are measured by the amount of the "CPA" or discount extended to the dealers.

A summary of the extent of the price discriminations favoring American's Smyrna dealers, as contrasted to its price to Marietta area dealers, during the seventeen day period involved, shown in cents per gallon, follows:

Day	Date	Discrimination in favor of Smyrna Dealers
Fri.,	10/10	0.0
Sat.,	10/11	3.5
Sun.,	10/12	3.5
Mon.,	10/13	3.5
Tue.,	10/14	6.0
Wed.,	10/15	8.0
Thu.,	10/16	8.0
Fri.,	10/17	10.0
Sat.,	10/18	7.5
Sun.,	10/19	7.5
Mon.,	10/20	8.5
Tue.,	10/21	11.5
Wed.,	10/22	5.0
Thu.,	10/23	5.0
Fri.,	10/24	5.0
Sat.,	10/25	5.0
Sun.,	10/26	5.0
Mon.,	10/27	5.0
Tue.,	10/28	0.0

American's price reductions were made in response to a gasoline price war which originated in Smyrna when on October 10, 1958, the operator of a major-brand station (Shell) posted a pump price meeting that of a station (Paraland) selling an "unbranded or private brand gasoline." The Paraland station was located one block south of the Shell station on the northern outskirts ~~of~~ Smyrna. It had just commenced operations. Thereafter stations in the vicinity selling other "major brands" (Texaco, Sinclair and Gulf) lowered their prices to match those of the Shell station. The Paraland station was located immediately to the rear of an American station operated by George Hicks. As the retail prices of gasoline dropped Hicks and the other American

Smyrna area dealers, with the assistance of a greater "CPA" than American extended to Marietta area dealers, also lowered their retail price. In lowering its price to the favored Smyrna dealers, American matched a pre-existing price reduction of at least one of the other major brands. And, in each instance, American first verified that its dealer's nearby rival major-brand stations were receiving price assistance from their suppliers.

The price war ended October 28, 1958, and the prices of all competitors returned to higher levels. American's "CPA" in the areas involved was then uniform.

Before proceeding to examine the evidence upon which the Commission bases its conclusion that American's discrimination in price between its Smyrna area and Marietta area dealers had the effect on customer competition proscribed by Section 2(a) we turn to consideration of the issue or issues which that examination must resolve.

American states that the principal legal issue presented for determination is whether "substantial 'injury' to competition within the meaning of Section 2(a) was caused by American's" price reductions granted to Smyrna area dealers but not to Marietta area dealers. American characterizes as subsidiary issues (1) whether the reductions, in any event, "were 'made in good faith to meet an equally low price of a competitor', and hence legally justified under the statutory 'meeting competition' proviso" and (2) whether the reductions "were granted in response to 'changing conditions affecting the market for' gasoline, and thus vindicated by the Act's 'changing conditions' proviso". In addition, American contends that irrespective of the merits, the Commission's order is defective as too broad and sweeping in scope.

From our analysis of the contentions advanced by American and the Commission we find that the major issue presented for our determination in this review is whether the Commission's finding and conclusion that American's discriminations in price between its customers had the adverse effect upon customer competition proscribed by Section 2(a) is supported by substantial evidence on the record considered as a whole and represents the application of the correct legal criteria.

The adverse effect upon competition requisite to establish the Section 2(a) violation with which the Commission has here charged American is that the price discrimination creates a reasonable probability of substantial injury to competition—such an injury as will with reasonable probability substantially lessen the ability of the unfavored dealers to continue to compete. Price discrimination does not *per se* constitute a violation of Section 2(a). *Anheuser-Busch, Inc.* v. *F.T.C.*, 7 Cir., 289 F. 2d 835. The price discrimination, no matter if substantial, must in the particular factual situation involved be capable of raising a reasonable probability of substantially lessening ability to compete. The protection intended to be afforded by the statute is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental. Price discrimination which shifts business between competitors in a "second line" case such as this, where competition at the customer level is involved, is, of course, a matter with which the statute is concerned. But in addition to competitors, price discrimination, and the fact of a shift of some business from or other adverse economic effect upon the unfavored customers, it is essential to the establishment of the violation here charged that there be a causal relation between the price discrimination to the favored customers and the

factor relied upon as evidencing an actual or reasonably probable substantial lessening of ability to compete on the part of the unfavored customers.

In the instant case not only was the actual economic loss sustained by the unfavored Marietta dealers during the Smyrna price war slight, but there is a lack of any substantial evidence to support a conclusion that this temporary and transient limited economic impact was the result of American's discriminatory price reduction to its Smyrna dealers, much less that it constituted a probable threat to the ability of the Marietta dealers to continue in competition. The record discloses no basis for a conclusion that there was a likelihood of any substantial impairment of the "vigor or health of the contest for business" between American's competing dealers. And that is the competition which is sought to be protected by the statute in the context of the situation here presented. Cf. *Anheuser-Busch, Inc.* v. *F.T.C.*, 7 Cir. 289 F. 2d 835, 840, and authorities there cited.

The gasoline price war in the Smyrna area attracted patrons from the Marietta area. There is testimony that there was a preference on the part of some motorists for American's gasolines, but only "if the price differential was not too great". And with respect to all major brands of gasoline the retail price differential between the two communities during the period here involved was such that it strains credulity to expect that customer loyalty and brand preference would have retained for American's Marietta dealers all of their patrons and their usual volume of business during the seventeen days of price cutting in the adjoining area.

And, as the evidence hereinafter summarized discloses, there is nothing to indicate that American's temporary price reductions, although discriminatory,

precipitated any reasonable probability of a substantial lessening of ability on the part of the unfavored Marietta area dealers to continue to compete. Nor is such relatively minor and temporary loss of business as is disclosed shown by substantial evidence or reasonable inference to have been the result of American's conduct.

Anderson, one of the six unfavored Marietta American dealers, operated a combined grocery store and service station on State route 3. His station was located approximately one and one-quarter miles north of favored Smyrna area dealer Hicks' station. There is evidence which supports a conclusion that the reduction in the volume of Anderson's gasoline sales during the period of the Smyrna price war represented a loss of gross profit to him of as much as $150.00. Smith, an unfavored Marietta area dealer, located about one-half mile north of Anderson, experienced a reduction in gallonage sold as compared with the equivalent periods in 1957 and 1959. But, on the figures and percentages shown by the record any loss of gross profit during the period to which the Commission points would be slight. Marietta dealer Hitt, who was located about five miles from Hicks—further north on route 3, testified that although "he might have lost some" business during the Smyrna price war period he "never complained about it." One of Hitt's patrons testified that during the price war he bought gasoline—12 or 14 gallons—from Hicks five or six times because of the cheaper price. Two other patrons of Hitt bought gasoline in Smyrna during the price war but neither the quantity of their purchases nor whether they patronized Hicks or any of the other three favored American dealers in the Smyrna area is disclosed.

American's Marietta area dealers Seagraves, Morris and Raines, who also were not afforded the higher "CPA's", were located on or near U.S. Highway 41. Seagraves was closest to Smyrna, approximately two and one-half miles away. He had just opened his station for business on October 1, 1958. He testified that during the price war in Smyrna he felt his business "slacking up each day" and that patrons were asking him when his price was going to come down, but that after October 15, 1958, when American increased his "CPA", he lowered his price and "business went to picking back up". Morris was located approximately one and one-half miles north of Seagraves. He testified that most of his business was transient but that the "locals" complained that his price was "higher than other people who had the same gasoline down the road". His sales dropped approximately 1,000 gallons during October 1958. This would represent a loss of about fifty dollars gross profit. Raines was located approximately two miles north of Morris. He testified that the Smyrna price war affected his business "to a certain degree". Some of his patrons told him that they were buying gasoline at the cheaper price in Smyrna. He estimated that his business during the price war period was reduced "$500.00 overall in all business". What this may have represented in loss of profit is not shown.

Thus, whatever injury to ability to compete, whether actual or probable, as is shown by the record, was not only minimal but there is no substantial evidence to show that it was the result of American's price reductions to its Smyrna dealers rather than for the most part attributable to the fact that the major brands of gasoline were being sold in the Smyrna area for substantially less than in the Mari-

etta area. American's dealer assistance in the Smyrna area in the form of increased "CPA's", higher than those extended to its Marietta area dealers, was the result of such condition not the cause of it. The record in this case does not afford a substantial basis upon which to attribute to American's conduct a reasonably probable substantial injury to competition.

The record here does not present that inherent capability of lessening competitive ability as was evidenced by the discriminatory pricing system in *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, which gave buyers of large quantities a built-in, routine and permanent price advantage over smaller rivals. *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726, also relied upon by the Commission, involved a systematic price discrimination based on "phantom" freight charges and geographic factors which carried a like inherent threat of substantial impairment to competition. In *E. Edelmann & Company* v. *F.T.C.*, 7 Cir. 239 F. 2d 152, the price discriminations were in the form of continuing differentials favoring larger purchasers over smaller purchasers without cost justification for such systematic pricing practices—a situation comparable to *Morton Salt*. In *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, the issue of substantial injury to competition was not involved. Such an injury was conceded (371 U.S. 505, 511–512, 518). *Sun Oil* is not apposite to the issue here under discussion.

In arriving at the conclusion that American's conduct had an effect on customer competition proscribed by Section 2(a) the Commission appears to have substituted the factor of the substantiality of the temporary price discrimination—the substantial price differential between the favored and the unfavored dealers—for the substantial injury to competition,

actual or reasonably probable, requisite to the establishment of the violation charged.

Pertinent here is the observation made in *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527 (citing Commissioner Elman's dissenting opinion in this case) that:

> "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis."

In reaching the conclusion we have we do not mean to imply that a showing of intended permanency of the price discrimination is necessary to establish a Section 2(a) violation. But there must be something more than an essentially temporary minimal impact on competition and probative analysis must reveal a causal relation between the price discrimination and an actual or reasonably probable injury to competition in the context of the factual situation involved.

In view of our conclusion that the record fails to disclose the requisite substantial injury to competition we need not consider the contentions made with respect to the additional issues American raises.

The order of the Commission is set aside and the Commission is directed to dismiss the complaint.

Order set aside.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the
Seventh Circuit
Chicago, Illinois, 60610

Tuesday, November 19, 1963

No. 13879

THE AMERICAN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE FEDERAL TRADE COMMISSION

Before Hon. LATHAM CASTLE, Circuit Judge; Hon. ROGER J. KILEY, Circuit Judge; Hon. LUTHER M. SWYGERT, Circuit Judge

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is hereby ordered by this Court that the order entered in this cause by the Federal Trade Commission on June 27, 1962, be, and the same is hereby set aside and the Commission

is directed to dismiss the complaint, in accordance with the opinion of this Court filed this day.

A true Copy:
Teste:

(Signed by) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1964